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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 502 133

no brief filed on merits for

ROBERT C. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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CASES CITED

STATUTES, ETC.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Robert C. Johnson, able-bodied seaman, for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Ninth Circuit, entered on the 24th day of March, 1947, modifying a judgment in his favor for $16,549.48 damages for personal injury, wages, maintenance and cure, entered March 8, 1946, by the District Court of the United States for the Southern District of California, Central Division, by eliminating the item of damages ($16,245.77), and train-fare home ($22.50), respectfully shows:

Summary Statement of Matter Involved

The negligence. Robert C. Johnson signed on the S. S. "Mission Soledad", a steam tanker, as an able-bodied sea-

man, on the 25th day of March, 1944, for a voyage westward from the port of Los Angeles, California, not to exceed twelve months and return to the United States. The operators of the vessel named in the shipping articles were "War Shipping Administration, Pacific Tankers, Inc., General Agents" (R. 151, 279) under Service Agreement Form G. A. A., Contract WSA 4942" (R. 32, 16, 10). Johnson's base pay was $107.50 per month (R. 61).

On the 30th day of June, 1944, Johnson was on board the S. S. "Mission Soledad" in Pearl Harbor, T. H., making the ship ready to go to sea, lowering the boom on the port side forward (R. 61). It was about 9 or 9:30 o'clock in the morning (R. 111).

Fore and aft guy lines steadied this boom while in position over the side of the ship and Johnson was working on the after guy line. One end of the after guy line was attached to the outer end of the boom and the other end of the guy line was fastened to the deck. The guy line was made up of two blocks or pulleys and two double-sheave lines, and a wire rope or penant leading from the forward block to the outer end of the boom. The boom had been brought forward and cradled (R. 62), the cradle being alongside the forward gun tube, as shown in Libelant's Exhibit 7 (R. 90, 91).

A "Maccano" deck had been erected on the main deck of the S. S. "Mission Soledad." This was a structure of beams, the composition of which is shown in a series of photographs introduced by the libelant as Exhibits 1-4 and 6-13, inclusive (R. 306). Counsel for the respondent stated that he had no objection to the pictures being offered for the purpose of showing the structure and particular layout of the "Mission Soledad" (R. 64). This "Maccano" deck was a superficial deck built about the deck cargo (R. 102).

The lower block of the after guy line had been unshackled from the deck, had been lifted to the top of the

"Maccano" deck and there straightened out in line with the tip of the nested boom so that the lines would run free while taking in the slack (R. 101). The ropes between the lower and upper blocks were then lying over the second and third athwartship beams of the "Maccano" deck (R. 109).

Johnson was on the main or well deck taking in the slack and bringing the two blocks of the after guy line together. He was assisting the quartermaster, named Dudder (R. 264, 210), who was above him on one of the fore and aft beams of the "Maccano" deck (R. 102).

Dudder was on a single beam, midway between the third and fourth athwartship beams, counting aft from the forecastle (R. 103), while Johnson was on the well deck below him and in front of him or just aft of the third athwartship beam (R. 105).

The slack line, which Johnson was coiling, ran first through the forward or upper block, then through the after block, then through the upper block again and then back to the after block where it was fastened (R. 106). The after block, which had been unshackled and lifted to the "Maccano" deck, Dudder carried in his hands (R. 107).

Between the first and second athwartship beams, that is, forward of both Dudder and Johnson, and between them and the end of the "Maccano" deck, was a boat davit in a position show on Libelant's Exhibit 4 (R. 89). From this photograph it appears that the top of the davit extended above the top athwartship beams of the "Maccano" deck. The ropes between the forward and after blocks as they lay on the "Maccano" deck were about three or four feet from this davit (R. 108).

What then happened, we are unable to state here in view of the opinion of the Circuit Court (R. 321), notwithstanding that the facts thereon were stipulated in a pre-

trial conference; the evidence thereon was held admissible by the trial court judge who tried the case; was found as a fact by the second trial judge who made his decision upon the record and made the findings and the decree; was read to Johnson as a statement of what happened, as set forth in Respondent's Exhibit A for identification; and assumed as a fact by respondent's own counsel in a colloquy between Court and counsel before the second trial judge. Our version of what happened will be discussed in the brief in support of this petition.

This is not a mere dispute over the evidence because the respondent offered no evidence with respect to the happening of the accident or the negligence involved. Respondent's only witness was one R. L. Frick, who gave testimony with respect to the respondent's defense of release. The Circuit Court states in its opinion (R. 318), although the fact does not appear in the record of the trial, that the respondents "located Dudder and arranged for his deposition to be taken." The record does show that the libelant's counsel at the trial assumed, without objection, that the deposition of Dudder having been taken as a witness for the respondents, was respondent's deposition and would be offered by the respondents (R. 64, 124).

We can only state here that it was conceded to the Court during the trial that Johnson was struck on the head by a block, that this particular block, at the time of the accident, was being carried by Dudder, and that the block alone weighed between 25 and 35 pounds (R. 124, 125).

As to the nature and extent of the injuries the record shows that the medical testimony takes up a good portion of the record, that the testimony of but one medical witness was taken at the trial, that he was jointly engaged by counsel for both petitioner and respondents (R. 223), and that the opinion of this doctor at the time of the trial,

November 13, 1945, then 15½ months after the injury, was that recovery "will probably take another year or 16 months" (R. 85).

The trial judge held that there was both general and specific negligence, that there was negligence of a fellow servant and also that the doctrine of *res ipsa loquitur* could be applied (R. 295, 296), and found as a fact that libelant was injured when he was struck on the head by a block that was negligently and carelessly dropped by a fellow seamen in the performance of his duties on the S. S. "Mission Soledad" (R. 43). The Ninth Circuit Court of Appeals held that that Court could not infer that Dudder dropped the block rather than having it pulled out of his hands by the libelant or that the circumstances were such as to warrant the inference of negligence (R. 321).

The release. The respondents returned Johnson to the port of San Francisco on July 30, 1944, and the following day, July 31, Johnson reported at the office of the respondent Pacific Tankers, Inc. to get the balance of his wages. There he was refered to the insurance company and to the office of an attorney, Mr. John Black (R. 114, 115, 198). Mr. Black was an attorney who represented the underwriters for the War Shipping Administration (R. 169). In Mr. Black's office he was interviewed by one of Mr. Black's assistants, Mr. R. L. Frick, who stated that he read to Johnson the portion of the Ship's report showing the circumstances of the accident (R. 211).

At the same time, a statement of the injury was prepared by Mr. Frick (R. 177), which was signed by Johnson and read by him on cross-examination (R. 132).

Johnson at the same time also signed a release (R. 179, 133, 132), Respondent's Exhibit B (R. 133, 267), which stated that the discharge was for wages as well as damages and maintenance. The consideration therefor was

a payment by check of the Pacific Tankers, Inc., dated July 31, 1944, in the sum of $247.10 (R. 134, 270), of which $150 was claimed by respondents to cover the item of damages (R. 289).

Up to the time that Johnson signed his release, he had not been advised as to his physical condition by any doctors since leaving Honolulu, and had not been advised by counsel of his rights (R. 143, 139). The trial court found that the record was clear that no one was present at the time of the signing of the release other than Mr. Frick, who was the legal advisor or assistant legal adviser to the underwriters, and Johnson (R. 188). Mr. Frick did not suggest that Johnson consult a physician or an attorney, or both (R. 199). Mr. Frick had been engaged in this work of adjusting claims for 14 years and handled four or five cases a day, five days a week (R. 196, 197). Both the trial court rendering the decision (R. 289) and the Circuit Court of Appeals (R. 326) held that the release could not stand.

Maintenance and cure.— After Johnson signed his release in San Francisco, he left immediately to live with his parents in San Diego. From then on until the trial, except for the time that he was in some Government Hospital or rest home, he lived with his parents or some other relatives. His expenses were paid for by his parents, but Johnson felt an obligation to repay them, being no longer a minor (R. 216). His age at the time of trial was 27 (R. 60). He spent all of his money on his own maintenance, about $600 (R. 217), and thereafter borrowed from his parents (R. 218).

From the time of the accident and up to the time of trial, Johnson had done no work and did not feel able to do any (R. 149). Petitioner's counsel moved to introduce before the United States Circuit Court on Appeals for the Ninth Circuit evidence of Johnson's continued disability until approximately April of 1947 (R. 310-315). This was denied (R. 316).

At the Public Health Service office in Honolulu, on July 5, 1944 (R. 112, 113, 177), and at the Marine Hospital in San Francisco on July 31 (R. 139), the doctors indicated that hospitalization was not necessary. Thereafter, Johnson was hospitalized at the Marine Hospital at Los Angeles from August 17 to 23 (R. 117) the Public Health Service certificate of discharge from this hospital stating that no further hospitalization was necessary, Libelant's Exhibit 16 (R. 245, 94, 95-98). The treatment at the Los Angeles hospital was followed by a stay at the Seamen's Rest Home at Santa Monica, California, from August 23 to October 1, 1944, *i. e.*, the full six weeks that were allowed anyone at this rest home (R. 117, 118).

Shortly after Johnson's return home from Santa Monica, he consulted a doctor at the Public Health Service office at San Diego and was asked by this doctor if he, Johnson, wanted to go to the Marine Hospital in San Francisco (R. 119). Johnson said that he would rather not go (R. 120), because it was just one doctor's opinion against a half dozen that he had seen already, and that he felt better when he could get away from all noise and just rest and enjoy people that he knew and things he had done (R. 121).

Following out this plan, Johnson did go with his mother to visit relatives at his birth place in Sabinal, Texas, during the first part of October and stayed there until January, 1945 (R. 121, 148). The Public Health office in San Diego told him to go to the Public Health office in Galveston and Johnson did so (R. 122), it appearing from the abstract of the United States Marine Hospital Station at Galveston, Texas (Libelant's Exhibit 20, R. 99, 253), that Johnson was examined there on November 30, 1944, and was advised to enter the Marine Hospital at Galveston, but that he refused to do so, and was then advised to return to his former home at Sabinal, Texas, and live and work on the ranch.

The Circuit Court of Appeals held that Johnson forfeited his right to maintenance and cure by a voluntary rejection of hospital care, stating that he had refused hospitalization at the Marine Hospital in San Francisco (R. 331). Both the trial court (R. 297, 45), and the Circuit Court of Appeals (R. 330), held that Johnson was not entitled to receive maintenance during the period of his disability and while he resided with his parents. The District Court found (R. 45), and the Circuit Court held (R. 328), that Johnson was entitled to maintenance at the rate of $3.50 per day for 18 days spent at Honolulu after the accident and for three days after his arrival in San Francisco. See Libelant's Exhibit 22 (R. 143, 258).

Wages, bonus, repatriation. The District Court found that Johnson would have earned the sum of $863.37 as wages upon the S. S. "Mission Soledad" until the voyage terminated, November 14, 1944 (R. 290), but that only $480.17 of this sum was straight time, and allowed recovery only for this latter sum (R. 44), disallowing the balance representing the bonus that he would have earned, as unauthorized (R. 291). The Circuit Court concurred in this finding (R. 328). The District Court found that Johnson was entitled to recover the sum of $22.50 as repatriation costs from San Francisco to Johnson's home in San Diego. The Circuit Court also disallowed this item of the recovery on the basis of an administrative interpretation of Rider 64 to the Ship's articles (R. 329).

The Basis of the Court's Jurisdiction

The jurisdiction of this Court is based upon Section 240(a) of the Judicial Code, as amended, Title 28 U. S. C. A. sec. 347(a).

The Federal Statute construed by the Court below, which construction is claimed to be in error in this petition, is The Jones Act (June 5, 1920, C. 250, sec. 33, 41 Stat. 1007, Title 46, U. S. C. A., sec. 688).

The date of the judgment sought to be reviewed is March 24, 1947. (R. 332).

Questions Presented

1. (a) Was there a correct interpretation by the Circuit Court of Appeals of the doctrine of *res ipsa liquitur* as applied in a seaman's case?

(b) Was there a correct application of that doctrine to the facts in this case?

(c) May the respondents, while not introducing any evidence whatever of the accident, draw a legal inference of libelant's negligence from what might have happened if the libelant had acted in a certain way?

(d) Did the Circuit Court adopt the natural and reasonable inference from the undisputed facts?

(e) Were the respondents negligent in failing to provide a safe place in which to work?

2. (a) Did the Circuit Court of Appeals properly interpret the doctrine of maintenance and cure?

(b) May the petitioner be refused maintenance and cure because he preferred, in view of his previous record of hospitalization, not to go from his home in San Diego to San Francisco for another period of hospitalization, but chose rather to go to his old home on a ranch in Texas, reporting while there to the Public Health Service unit in Galveston to which he had been referred and where he was advised as an alternative to stay on the Texas ranch, which alternative he accepted and followed?

(c) May a disabled seaman, not a minor, be refused maintenance and cure because his family cares for him while he is disabled and in an indigent condition?

3. (a) Was the Circuit Court of Appeals justified in disregarding the findings of fact of the District Court as to the negligence of respondents in the absence of a finding of plain and manifest error in those findings?

(b) Was the Circuit Court justified in disregarding the facts of the injury as stated in paragraph 11 of the Purser's accident report, overruling in this respect the Hon. Harry A. Hollzer, who tried the case, and the Hon. Charles C. Cavanah, who decided the case on the record?

(c) Did the Circuit Court rightly determine that the failure of libelant to offer in evidence the deposition of respondent's witness was fatal to libelant's contentions?

(d) Was the Circuit Court justified in failing to accept the facts of the accident as admitted by counsel for the respondents in his argument before the District Court?

Reasons Relied Upon for the Allowance of the Writ

(1) The decision of the Circuit Court of Appeals for the Ninth Circuit in this case on the question of *res ipsa loquitur* is in conflict with the applicable decisions of this Court in

Jesionowski v. *Boston & Maine R. R.*, 91 L. Ed. Adv. Opin. 355 (decided Jan. 13, 1947);

Commercial Molasses Corp. v. *N. Y. Tank Barge Corp.*, 314 U. S. 104, 111 (1941);

and is in direct conflict with the decisions of the Courts of the following circuits dealing specifically wth seamen's cases:

Fifth Circuit—

Meton S. S. Co. v. *Jensen*, 62 F. (2d) 825 (1933);

Fourth Circuit—
Fauntleroy v. *Argonaut S. S. Line, Inc.*, 27 F. (2d) 50 (1928);

Seventh Circuit—
Leathem Smith-Putnam Nav. Co. v. *Osby, et al.*, 79 F. (2d) 280 (1935);

Ninth Circuit—
Johnson v. *Griffiths S. S. Co.*, 150 F. (2d) 224 (1945).

The questions of *res ipsa loquitur* presented in this case have not heretofore been decided by this Court, nor, so far as we have been able to find after diligent search, has the Court decided a seaman's case involving *res ipsa loquitur*. These questions should be decided in this case, we submit, for the reasons (1) that a seaman's case is *sui generis* considering the traditional solicitous regard of the Court for the seaman's welfare,—the inferences in his favor being zealously guarded. The libelant in this case had been a seaman for two years before the accident and intended to make seamanship his career (R. 130, 144); and (2) that the circumstances of the accident in this case involving work about a "Maccano" deck erected for deck cargo purposes make the decision in this case of special significance in admiralty and to all seamen.

The law in these seamen's cases of *res ipsa loquitur* has now been left in a state of great confusion by the decision of the Ninth Circuit Court of Appeals, a court of powerful influence in such cases, and is in dire need of a clarifying and authoritative declaration on the subject by this Court.

(2) The Circuit Court of Appeals for the Ninth Circuit, as to the questions of maintenance and cure presented in this case, has decided important questions of Federal law which have not been but should be settled by this Court.

The questions here involved were reserved in the case of *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130, 135 (1928) and their existence was noted in the case of *Calmar S. S.* v. *Taylor*, 303 U. S. 525, 531 (1938).

The decision is also in direct conflict with the decisions of the following circuits:

Second Circuit—

Moyle v. *National Petroleum Transport Corp.*, 150 F. (2d) 840 (1945);
Rey v. *Colonial Nav. Co.*, 116 F. (2d) 580 (1941);
The Bouker No. 2, 241 Fed. 831 (1917);

Third Circuit—

The Balsa, 10 F. (2d) 408 (1926);

First Circuit—

Reed v. *Canfield*, 20 Fed. Cases 426 Case No. 11641 (Cir. Ct., Dist. Mass, 1832).

(3) The decision of the Circuit Court of Appeals for the Ninth Circuit in refusing to follow the findings of fact of the District Court on the question of negligence on the part of the respondents and in the absence of a finding of plain and manifest error in those findings, is in direct conflict with the decisions of the following circuits:

Second Circuit—

City of N. Y. v. *Nat'l. Bulk Carriers*, 138 F. (2d) 826 (1943);
Johnson v. *Andrus*, 119 F. (2d) 287 (1941);

Third Circuit—

The Cleary Bros., No. 61, 61 F. (2d) 393 (1932);

Fourth Circuit—

The Yamachichi, 74 F. (2d) 977 (1935); 103 A. L. R. 768 and anno. at page 775;

Sixth Circuit—

City of Cleveland v. *McIver*, 109 F. (2d) 69 (1940);

Johnson v. *Kosmos Portland Cement Co.*, 64 F. (2d) 193 (1933);

Seventh Circuit—

Leathem Smith-Putnam Nav. Co. v. *Osby, et al.*, 79 F. (2d) 280 (1935), cert. den. 296 U. S. 653.

The decision with respect to the propriety of review of the District Court's findings is also submitted to be in conflict with the applicable decision of this Court in *Schnell, et al.* v. *The Vallescura*, 293 U. S. 296, 302 (1934).

The decision of the Circuit Court that libelant's failure to offer in evidence the deposition of respondent's witness was fatal to libelant's contention of negligence is in direct conflict with the decisions of the following circuits:

Second Circuit—

The Elkton, 35 F. (2d) 49, 52 (D. C., E. D. N. Y., 1929), aff'd 49 F. (2d) 700 (C. C. A. 2, 1931);

Eighth Circuit—

Iowa Cent. Ry. Co. v. *Hampton Elec. Lt. & Power Co.*, 204 Fed. 961 (1913);

Sixth Circuit—

Erie R. Co. v. *Kane*, 118 Fed. 223 (1902);

and is submitted to be in conflict with the applicable decision of this Court in *Commercial Molasses Corp.* v. *N. Y. Tank Barge Corp.*, 314 U. S. 104, 111 (1941).

The decision of the Circuit Court in refusing to accept the facts of the accident as stated by counsel for respondents in argument before the District Court judge, who decided the case (R. 299), is believed in direct conflict

with the decisions of this Court as to the admissibility of such evidence:

Oscanyan v. *Winchester Repeating Arms Co.*, 103 U. S. 261 (1880);
Best v. *Dist. of Columbia*, 291 U. S. 411, 415 (1934).

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Opinions of the Courts Below

The opinion of the Circuit Court of Appeals has not been officially reported at the time this is written, but is printed in the record (R. 317).

The oral opinion of the District Court for the Southern District of California, Central Division, has also not been officially reported, but is printed in the record (R. 289), and the findings of fact and conclusions of law of the District Court are printed in the record (R. 41).

Specification of Errors

(1) The Circuit Court of Appeals for the Ninth Circuit erred in making the following ruling:

"Appellant contends, (1) that there is no evidence to support the District Judge's finding of negligence, and (2) that the doctrine of res ipsa loquitur is not here available as a substitute for proof of negligence.

"We think both of these contentions are well taken. As to the first, the only testimony on the subject of negligence is the evidence of appellee who stated that Dudder was carrying the block and walking forward on the meccano deck above, as appellee would pull on the rope. Appellee's evidence does not confirm the unsupported statement in the purser's later report of the accident, and appellee's evidence is at variance with the pre-trial stipulation, since appellee's testimony showed that Dudder was not directly 'above libellant' but was diagonally above him and to his rear. Further, Dudder was not 'removing a block' but was assisting appellee in 'rounding in', i. e., carrying the block forward as appellee pulled free lengths of the line attached to the block, and coiled the line thus accumulated."

(2) The Circuit Court of Appeals erred in making the following ruling:

"It is also said that the doctrine is not applicable unless 'by a process of probable reasoning, the facts and circumstances point out the wrongdoer, the tortious character of his act and exclude other probable causes of the injury'.".

(3) The Circuit Court of Appeals erred in making the following ruling:

"The last act remembered by appellee of coiling the rope is not a fact from which we can *infer* that Dudder dropped the block, rather than having it pulled out of his hands by appellee. This becomes more evident when it is remembered that in many concussion cases, lapse of memory antedates the actual injury by short periods of time. The first diagnosis of appellee's injury was a probable mild concussion.

"It must also be borne in mind that the block and tackle on which appellee and Dudder were working is designed for the 'purpose of multiplying force,' * * * and that whatever the force of appellee's pull on the rope that pull was multiplied at Dudder's end of the block by at least three to four times the force exerted by appellee, since there were four lines of rope between the blocks. Thus, if appellee pulled on the free end of the rope with a 25-pound pull, Dudder's end of the block would come along with a pull of at least 71.4 pounds. * * *

"Under these circumstances, with the actual cause of the accident totally unexplained, we cannot say that the 'facts of the occurrence warrant the inference of negligence' (Sweeney v. Erving, supra, note 6, p. 240), or 'that the circumstances were such as to justify a finding' that the accident was the result of appellant's negligence. (Jesionowski v. Boston & Maine Ry., supra)."

(4) The Circuit Court of Appeals erred in making the following ruling:

"We do not think that the falling of a block during a 'rounding in' operation is an accident which is 'ordinarily the result of negligence' such as a derailment in the Jesionowski case, supra. No negligence appearing, the awards of general damages for pain and suffering and for anticipated loss of wages are disallowed."

(5) The Circuit Court of Appeals erred in making the following ruling:

"An initial report of the accident on a form filled out by the purser of the vessel indicated that the 'guy block was caught on a davit, one of the men cast it off and line and block fell free striking this sailer on the back of the head * * *'

"While this report was marked for identification, it does not appear that it was ever formally admitted in evidence."

(6) The Circuit Court of Appeals erred in making the following ruling:

"The case was tried before Judge Hollzer who died after its submission but before deciding the matter. The cause was then submitted on stipulation to another District Judge who decided the matter on the written record and oral argument and without the usual opportunity of a trial judge to see and hear the witnesses. For that reason, and because this is an appeal in admiralty, the findings of the trial court do not come to us encased in their usual armor."

(7) The Circuit Court of Appeals erred in making the following ruling:

"There is no competent evidence that Dudder *dropped* the block or was otherwise negligent in any way. There is in fact, no evidence as to Dudder's activities, appellee having chosen not to use Dudder's deposition, although he is resting his case, so far as negligence is concerned, entirely on the negligence of a fellow-servant. This gap in appellee's case is thus necessarily fatal to his contention."

(8) The Circuit Court of Appeals erred in making the following ruling:

"His only attempt to show that he had incurred any liability for his maintenance during this period was his testimony that he 'felt an obligation to repay' his parents, and that he had used his own money which he approximated at $600 on his maintenance.

"However, other testimony by appellee negatives these statements since, when asked 'who paid for your room and board', appellee answered that his father and

mother 'stood the expenses', and appellee later admitted that all his food was 'supplied', in addition to his room, laundry, and other necessary services."

(9) The Circuit Court of Appeals erred in making the following ruling:

"We think appellee was furnished his *necessary* living expenses without cost to himself and without liability to his parents. Under Sections 206 and 210 of the California Civil Code appellee's parents are required to maintain him to the extent of their ability since he was without funds and unable to maintain himself and they are not entitled to compensation for this required support 'in the absence of an agreement therefor'. No such agreement having been shown, appellee has failed to establish that he had incurred any expense or obligation for necessary maintenance while he lived with his parents and hence, cannot receive maintenance for that period."

(10) The Circuit Court of Appeals erred in making the following ruling:

"Appellee refused hospitalization in the Marine Hospital in San Francisco because 'I couldn't see going back to another hospital. It was just one doctor's opinion against a half dozen or more that I had seen already.'

"It appears to be well settled that a seaman's right to maintenance and cure is forfeited by voluntary rejection of hospital care."

(11) The Circuit Court of Appeals erred in making the following ruling:

"Appellee's motion to take further proof in support of his claim for maintenance for the period since the trial in the District Court, during which time appellee has continued to live with his parents, is denied."

THE ARGUMENT

POINT I

The Circuit Court of Appeals for the Ninth Circuit wholly misconceived the law of *res ipsa loquitur* as stated in the applicable decisions of this Court and grievously misapplied that law to the facts in this case.

As we see it, the foremost error of the Circuit Court lies in a reading into the law of *res ipsa liquitur* as stated by this Court in the case of *Jesionowski* v. *Boston & Maine R. R.*, 67 S. Ct. 404 (1947), the law of *Smith* v. *U. S.*, 96 F. (2d) 976 (C. C. A. 5, 1938), applying to an entirely different situation.

From the *Smith* case the Circuit Court quoted: "by a process of probable reasoning, the facts and circumstances point out the wrongdoer, the tortious character of the act and *exclude other probable causes of the injury,*" (emphasis supplied) (R. 320), and proceeded from this beginning to require that the probable reasoning should also exclude any possible inferences from any other conduct which the Court thought that petitioner might have been capable of—specifically, pulling the block from Dudder's hands (R. 321).

As we read the *Jesionowski* case, the law is rather, whether the facts and circumstances of the accident "call for an explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict." If this is so, then the District Court was correct in the facts found because respondents offered no evidence whatever as to the cause of the accident.

To reconstruct, then, the facts and circumstances of the accident and enumerate the inferences as warranting the finding of negligence calling for rebuttal or explana-

tion, and to show more clearly wherein the Court erred, there is:

(1) The pre-trial stipulation signed by the proctors for the parties and the Court (R. 36) that "libelant was performing duties aboard the ship and sustained an injury when a block, which was being removed by a man working above libelant, fell, striking libelant on the back of the head."

(2) The paragraph 11 of the Purser's accident report (R. 210, 263) which respondent's witness, Frick admitted to the Court (R. 204) and also on cross-examination (R. 211) that he read to the libelant on the occasion of the signing of the release, reading as follows:

> "A. I said I had the impression that I had read off to him that portion of the report showing the circumstances of the accident.
>
> Q. And your impression was that under No. 11 you read the following then: 'Sailors were stowing the forward port side boom and the guy block was caught on a davit, one of the men cast it off and line and block fell striking this sailor on the back of the head, block causing a large cut on this man's scalp. Five stitches were taken in his head at the Navy Dispensary.' Now with reference to that you now say that your recollection is that you read off at least the part that told how the accident happened?
>
> A. I think I did, as I very often do, in order to get the version as a basis for a statement, I simply say, 'Now, here is the report, is this about the way it happened,' and I read it to him."

(3) A photograph, Libelant's Exhibit 4 in evidence, (R. 89), which shows a davit was three or four feet to the side of the position of the ropes between the forward and after blocks (R. 108), together with Johnson's further testimony that unless the ropes between the two blocks were taut, the rope could not be pulled in (R. 108, 101).

(4) The stipulation that Johnson was coiling the rope when the block hit him, that Dudder had been carrying the block in his hands (R. 125), and that Johnson did not know what it was that struck him (R. 110, 203, 132). As he said (R. 132):

> "On June 30, 1944, while the vessel was at Pearl Harbor, Honolulu, at about 8:35 a. m., we were stowing the forward port boom, and while we were doing this I was struck in the head by an object which I was afterwards told by others was a block which I understood was dropped by one of the seamen who was standing above me on one of the cross beams."

Summarizing these circumstances, we have:

(1) With the ropes caught on the davit and therefore not "taut", Johnson could not pull the rope through the block. Moreover the rope itself, it is to be remembered, ran from Johnson's end through the forward block and then back to the after block in Dudder's hands (R. 106). Therefore, as a matter of practical physics, the inferences that Johnson did not pull the block from Dudder's hands are strongly in his favor.

(2) If Johnson was coiling rope when the block hit him, he must have been coiling the free rope that had been accumulated prior to the time that it caught on the davit. It certainly took a little time to get the ropes off of the davit. Therefore, as a pure matter of timing, the inferences that Johnson did not pull the ropes from Dudder's hands are strongly in his favor.

Who it was that removed the block from the davit does not appear in the evidence. The flat statement of the Circuit Court of Appeals, therefore, that "Dudder was not 'removing a block', but was assisting appellee" is a serious error. Although we feel justified, we do not reveal who it was that removed the block.

We do point out, however, how grievous this error is. Without warrant it removes from suspicion the only other person, named as being on the scene (R. 264), and, more important, it clears respondent of the duty of explaining Dudder's conduct,—of rebutting the presumption of negligence on the part of Dudder.

Since Johnson did not know what it was that hit him (R. 110, 203, 133), and while the respondents did have such knowledge (R. 262, 264, 210, 204, 211), it would seem that it was respondents' duty to come forward with the explanation.

Commercial Molasses Corp. v. *N. Y. Tank Barge Corp.*, 314 U. S. 104, 111 (1941);
Fauntleroy v. *Argohaut S. S. Line*, 27 F. (2d) 50, 51 (C. C. A. 4, 1928).

An earlier decision of the Circuit Court of Appeals for the Ninth Circuit, but a decision by three different judges, in *Johnson* v. *Griffiths S. S. Co.*, 150 F. (2d) 224, 226, we submit, correctly states in a comparable situation—the finding of an injured man at the bottom of an open hatch—that "in determining proximate cause it is not essential that the causal connection be shown by direct evidence; the causal connection can be shown by facts and circumstances which, in the light of ordinary experience, reasonably suggests that the defendant's negligence in the manner charged operated proximately to produce the injury."

This is particularly so, we submit, in the case of the seaman who "has been given a special status in the maritime law as the ward of the admiralty, entitled to special protection of the law not extended to land employees." *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 125, 91 (1945). The probable reasonable inferences from the circumstances of the seaman's injury should therefore be zealously protected by a court sitting in admiralty.

A further misapprehension and misapplication of the law in *San Juan Lt. & Transit Co.* v. *Requena*, 224 U. S. 89

(1912), as restated in the *Jesionowski* case, supra, occurs in the conclusion of the Circuit Court (R. 322) that

> "I do not think that the falling of a block during a 'rounding in' operation is an accident which is 'ordinarily the result of negligence.' "

This conclusion overlooks two other aspects of the doctrine of *res ipsa loquitur* as we understand it to have been stated in the *Jesionowski* case, *supra*, to wit (1) exclusive control by defendant of all causative factors, although the plaintiff may have participated in the operation, and (2) proper care on the part of the defendant having control of the causative factors. The Circuit Court entirely overlooks the second aspect.

To show the effect of that error in this case, libelant's proctor took great care to show the particular structure and layout of the "Maccano" deck on the S. S. "Mission Soledad". Twelve of the thirteen photographs in evidence show this detail of the place where the accident happened.

He was careful to point out that the fore and aft beams of the "Maccano" deck shown in the photographs were different as shown there than on the S. S. "Mission Soledad" in that they were bunched in the photographs to form a catwalk, whereas, on the S. S. "Mission Soledad" they were not so bunched and that they were movable (R. 63, 88, 93), and that Dudder, who carried the block in his hands (R. 107) was walking on a single beam (R. 102, 103, 132, 299). The Purser's report of the accident named but one witness to the accident, to wit, Dudder (R. 264).

We submit that the evidence clearly shows that the libelant was not furnished a safe place in which to do his work; that the operation under the special circumstances shown, although not ordinarily, was extremely hazardous; and that respondents, in discharge of the duty of proper care, should have carefully supervised the operation, which they clearly did not do.

On the contrary, because the free deck space had been taken up by the "Maccano" deck, Dudder was required to mount to the top of one of the beams of the "Maccano" deck and on that beam to support the weight of two 35-pound blocks, the weight of the ropes consisting of four lines of rope between the blocks, each rope about 36 feet in length [Dudder being between the third and fourth athwartship beam and the beams being 12 feet apart (R. 103), and the forward block which was caught on the davit being just aft of the first athwartship beam (R. 108)], plus 30 feet of wire rope or pennant from the forward block to the top of the boom (R. 109, 92).

If the operators of the ship wished to carry a deck cargo and erect the "Maccano" deck to provide for it, it would seem that they should have provided a catwalk on the top beams of the "Maccano" deck with stanchions and ropes or chains for support for the person required to work there.

The regulations of the Bureau of Marine Inspection and Navigation, with specific reference to deck cargoes of timber, show an official recognition of the danger to a ship's operation in the use of such a structure. C. F. R., 1939, Title 46, Chap. I, Sections 43.85, 43.86. No similar regulations with respect to other kinds of deck cargo have been found.

The respondents having had exclusive control of the block, could not possibly have discharged the duty which was upon them of showing proper care or supervision of the operation when the accident happened.

There was no assumption of risk on the part of libelant in working under such conditions, of course. *Arizona* v. *Anelich*, 298 U. S. 110 (1938).

It is reasonably certain that the factor of reasonable care and supervision which the Circuit Court overlooked could have prevented the happening of this accident.

The Meton, 62 F. (2d) 825 (C. C. A. 5, 1923);

Fauntleroy v. *Argonaut S. S. Line*, 27 F. (2d) 50 (C. C. A. 4, 1928).

There is instinct in the Circuit Court's opinion, we submit, and adherence to the old common law doctrine of contributory negligence, and a holding of the libelant to the duty of disproving any negligence on his part, notwithstanding that that issue was not raised in the pleadings and was not included in the issues of the trial, as stipulated at the pre-trial conference (R. 39, 40), and that under the *Jones Act*, 46 U. S. C. A. Section 688, which makes applicable the provisions of the *Employers' Liability Act*, 45 U. S. C. A. Section 53, contributory negligence is not a bar to the action.

POINT II

The preference of Johnson for treatment at his old home on a ranch in Texas, acquiesced in by the Public Health Service officials, and his care thereafter by his family, was not such a refusal of maintenance and cure or a showing of lack of necessity therefor as to allow respondents to escape financial reckoning for their contractual duty.

It has been well recognized for over a century in this country that the obligation of a shipowner or operator which is owed to a seaman for his maintenance and cure is contractual in its nature, being a part of the contract for wages and a material increment in the compensation for his labor and services.

Hardin v. *Gordon*, 2 Mason 541, 11 Fed. Cases 480, 481, Case No. 6047 (Cir. Ct., Dist. Mass., 1823),—"the classic passage by Mr. Justice Story", said the late Mr. Chief Justice Stone in—

Calmar S. S. Corp. v. *Taylor*, 303 U. S. 525, 527 (1937);
Cortes v. *Baltimore Insular Line*, 287 U. S. 367, 371 (1932);
Pacific S. S. Co. v. *Peterson*, 278 U. S. 130, 135 (1928).

How far, then, can a shipowner claim absolution from others for its own contractual duty of maintenance and cure?

First, how far can it substitute the beneficial provisions of the *Public Health Service Act*, 42 U. S. C. A. 249(a), 249(a)(1), 249(e), which provides hospital service to seamen without cost to either the seaman or the shipowner?

It is submitted that here, after repeated visits to the Public Health Service hospitals, it appeared that for Johnson's type of injury only out-patient service was necessary and not extended hospitalization, and it also appeared that the Public Health Service officials acquiesced in Johnson's plan to go to his old home in Texas because, as Johnson said:

> "Rest seemed to be the best thing for me. I felt better when I could get away from all noise and just rest and enjoy people that I know and things that I had done" (R. 121).

It is submitted that under such circumstances there is no such refusal of Public Health Hospital Service as to discharge the respondents from liability.

Moyle v. *National Petroleum Transport Co.*, 150 F. (2d) 840 (C. C. A. 2, 1945);
Rey v. *Colonial Navigation Co.*, 116 F. (2d) 580 (C. C. A. 2, 1941).

A tabulation of Johnson's hospital experience appearing in the record shows:

No.	Date	Location of Public Health Service Hospital attended or contacted	Comment on Discharge	Record Page
	1944			
1	7/1-6	Honolulu	Released from hospital. Not fit for duty for indefinite period. Fit for travel.	97, 241, 242
2	7/30	San Francisco	"If you don't feel in the need of hospitalization don't come out."	139
3	8/17-23	Los Angeles	"No further hosp. nec."	98, 247, 245
4	8/23-10/1	Santa Monica	"To continue treatment at San Diego U. S. P. H. S."	99, 249, 118
5	10/4-5	San Diego	Advised hospital care and referred to Public Health Service in Galveston.	99, 251, 122
6	11/30	Galveston	"Patient was advised to enter the Marine Hospital in Galveston for observation, but refused to do so. He was then advised of opportunity to enter near-by Rest Center at Kittiwake and also refused to do this. He was then given medication and advised to return to his former home at Sabinal, Texas and live and work on ranch."	99, 253, 254
	1945			
7	1/20	San Diego	"Condition of patient on Jan. 20/45 same."	100, 256

The conversation referred to in the Circuit Court's opinion as constituting the refusal was the interview with the Public Health Service doctor at San Diego on October 5th, No. 5 above. The full account of this interview appearing in the record shows that Johnson did not "refuse" to go but stated that he would rather not go (R. 120) and that the office in San Diego told him to go to the Public Health Service in Galveston (R. 122). These facts are submitted

as showing a clear acquiescence in out-patient treatment and rest at Johnson's home.

The limits of cure or care both as to the kind of treatment and time of continuance must always depend on the facts of each particular case. (*The Bouker No. 2*, 241 Fed. 831, 835 (C. C. A. 2, 1917); cert. den. 245 U. S. 647.)

Second. How far can the ship operator substitute for its contractual duty of maintenance and cure the provisions of a State law requiring support of an indigent by members of his family?

The State law in question here is California Civil Code, Section 206, which requires members of a family of a poor person, unable to support himself, to maintain such person to the extent of their ability, but provides that a promise to pay for such service is enforcible. (*Deering's Civil Code of California*, Section 206.) We see no application in Section 10 of the Civil Code to which the Circuit Court also referred.

Section 206 is found under the heading "Parent and Child" and could hardly have been enacted with any idea that in doing so the indigent person was being deprived of a contractual right for his care.

If the *Public Health Service Act, supra*, which expressly includes seamen as among those entitled to the benefit of its provisions, does not relieve the ship operators of the contractual duty of maintenance and cure, *a fortiori* a State law, merely a part of the general laws of the State relating to the relation between parent and child, should not exempt them.

Long ago it was urged that the provisions of a predecessor act to the *Public Health Service Act, supra*, satisfied the maritime law with respect to maintenance and cure. This was urged in a case before Justice Story ten years after his decision in *Hardin* v. *Gordon, supra*, in the case of

Reed, et al. v. *Canfield*, 20 Fed. Cases, Case No. 11641 (Cir. Ct., Dist. Mass., 1832), the learned Justice stating, at p. 428:

> "It is said that the acts of Congress respecting hospital money and the relief of the sick and disabled seamen provide suitable means for the relief of seamen in the home ports and therefore may be deemed to satisfy the maritime law, even if it reaches to relief in cases like the present. But it appears to me that they are rather to be deemed supplementary to the maritime law."

The *Shipowner's Liability Convention of 1936*, 54 Stat. 1693, Benedict on Admiralty, 6th Ed., Vol. 6, p. 294, proclaimed by the President September 29, 1939, as effective from and after October 29, 1939, contains no such escape hatch as a State law for the shipowner's contractual obligation for maintenance and cure. Article 4 thereof states:

> "The shipowner shall be liable to defray the expenses of medical care and maintenance until the sick or injured person has been cured or until the sickness or incapacity has been declared of a permanent character."

Authorization for the United States to join in this Convention was given by Joint Resolution of Congress on June 19, 1934, 48 Stat. 1182.

There are two branches to this second question on maintenance and cure, (1) the existence of the State law just mentioned, and (2) the fact that the maintenance and cure may have been given by the family without an express promise to pay therefor by the indigent.

Although the Circuit Court claims that Johnson did not testify that he expressly promised to pay his parents for his maintenance, Johnson did say that he felt an obligation to repay them, being no longer a minor (R. 216), and that

at some future time he would repay them (R. 217), and that he borrowed money from his parents (R. 218). He testified that he had spent all of the money earned on the ship, about $600, on his maintenance (R. 217).

The amount of the per diem maintenance here is not in issue, however, as that was expressly stipulated by counsel for the respondent to be at the rate of $3.50, the liability only being in dispute (R. 220).

The fact that the seaman was cared for by the members of his family does not discharge the shipowner of the obligation to pay for the reasonable cost of the maintenance and cure.

The Bouker No. 2, 241 Fed. 831, 836 (C. C. A. 2, 1917);
The Balsa, 10 F. (2d) 408 (C. C. A. 3, 1926).

It is "the reasonable cost of the maintenance" that was taken by this Court as the measure of the seaman's recovery in *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 532 (1938).

POINT III

The Circuit Court erred in refusing to follow the findings of fact of the District Court on the question of negligence.

A. *The Circuit Court erred in following the rule of review of testimony taken by deposition.*

The Circuit Court disregarded the findings of fact of the District Court for the reason that the Trial Judge who presided at the pretrial conference and tried the case died before making his decision, and that the decision in the case was made on the record by another district judge (R. 319). The Circuit Court cited as authority the case of *The Ernest F. Meyer*, 84 F. (2d) 496, 501 (C. C. A. 9, 1936).

The situation in *The Ernest F. Meyer*, however, was entirely different than in the case at bar. There the court brought itself within a rule of law followed by several of the circuit courts that where all or nearly all of the testimony was by deposition, the presumption in support of the findings has slight weight. The court in *The Ernest F. Meyer* stated (p. 501) that "the evidence of all the officers and crews of both vessels * * * is by deposition."

On the contrary it is submitted that this case properly falls within the category of concurrent rules of fact by two Lower courts which are not to be disturbed.

Mahnich v. *Southern S. S. Co.*, 321 U. S. 96, 98 (1943);
Pendleton v. *Benner*, 246 U. S. 353, 354 (1917).

In petitioner's case, there was no testimony by deposition. The respondents offered no evidence on the subject of negligence. The strongest opposition to libelant's introduction of evidence and the only dispute of importance as to libelant's introduction of evidence came in the introduction of the purser's report (Libelant's Exhibit 25 for identification, R. 210, 262). The important part of this exhibit, however, Paragraph 11, was proven to have been read to the libelant upon the occasion of his signing of the release. This was admitted by respondent's Claim Agent, Mr. Frick, to the court (R. 204), and to the libelant's proctor, upon cross examination (R. 211).

Both the Judge trying the case, Hon. Harry A. Hollzer, and libelant's proctor maintained on the trial that the report was admissible in evidence (R. 206), and over objection of the respondent's proctor that the report was inadmissible as being (1) an unauthorized admission of a fellow servant (R. 204), and (2) a privileged communication (R. 208). The Trial Judge was clearly right in his position. (*The Cleary Bros. No. 1*, 61 F. (2d) 393, C. C. A. 3, 1932.)

The Purser's report explains the pretrial stipulation of fact entered into between proctors for both parties and signed by the Trial Judge to the effect that libelant was injured "when a block, which was being *removed*, by a man working above libelant, fell striking libelant on the back of the head." (Emphasis added) (R. 36).

The Judge making the decision on the record, the Hon. Charles C. Cavanah, reached the same conclusion as did the Trial Judge, Hon. Harry A. Hollzer, because in making his oral decision, Judge Cavanah states (R. 295):

> "* * * As I gather from this case, this libelant was on this boat, curling this rope around, and above him this block fell and hit him that was above him; that there was a man above there that was a fellow servant of the working man. That is negligence. If he so operated that block up there that it swung around and struck this man in the head, that is negligence by a fellow servant. * * *"

These facts, which mention the operation of the block and the swinging around of the block would seem to relate to the facts as stated in the Purser's report. Thus we have one judge at the trial before witnesses, and another judge upon the record, coming to the same factual conclusion as to the negligence. The Circuit Court ignored these concurrent expressions of opinion on the facts of the negligence by the two lower court judges.

B. *The Circuit Court erred in failing to find plain and manifest error in the findings on the facts of negligence.*

The Circuit Court should have followed the customary practice of the courts of the majority of the circuits, as shown in the petition for certiorari, *supra*, and the policy as indicated by this Court in *Schnell, et al. v. Vallescura*, 293 U. S. 296, 302 (1934), and sought for plain and mani-

fest error in the District Court's findings of fact before disregarding them. If this had been done, it is believed that there would have been no reversal nor any necessity for this petition to this Court.

C. *The Circuit Court erred in failing to hold respondents under the duty of coming forward with information as to the happening of the injury.*

It is to be remembered that plaintiff offered no evidence of negligence at all and that Johnson did not know what it was that hit him and how he was struck (R. 110, 203, 132). Respondents, on the other hand, did know what happened and how it happened as is borne out by the Purser's report and the respondents' action upon that report (R. 262, 264, 210, 204, 211).

The unfavorable presumption that should have existed therefore, was one against the respondents. (*Commercial Molasses Corp.* v. *N. Y. Tank Barge Corp.*, 314 U. S. 104, 111 (1941).)

Adopting the reasoning of the case just cited, it was respondents' duty to offer evidence as to how the accident happened for the reason that respondents, being in a better position to know the cause of the injury, were under the duty of coming forward with the information.

D. *The Circuit Court erred in holding that libelant's failure to put in evidence the deposition of respondent's witness was fatal to libelant's case.*

The Circuit Court concluded that the failure of libelant to put in evidence the deposition of Dudder, whose testimony had been taken as a witness for respondent and this deposition made available to the libelant (R. 318) was fatal to respondent's case (R. 319). No authority was cited for this holding and since this information was equally available to both parties, no unfavorable inference should have

been taken against one party any more than against the other party.

The Elkton, 35 F. (2d) 49, 52 (D. C. E. D. N. Y., 1929); affirmed 49 F. (2d) 700 (C. C. A. 2, 1931);

Iowa Cent. Ry. Co. v. *Hampton Elec. Lt & Power Co.*, 204 Fed. 961 (C. C. A. 8, 1913);

Erie R. Co. v. *Kane*, 118 Fed. 223 (C. C. A. 6, 1902).

The District Court then was justified on the trial in finding no unfavorable inferences on this ground against the libelant.

E. *The Circuit Court erred in ignoring the admission of respondents' proctor made at the time of trial and before the court as to the circumstances of the injury.*

The Circuit Court ignored the fact that respondents' proctor in a colloquy between court and counsel occurring just after the District Court had made the decision on the record, made the following admission (R. 299):

"Mr. Fall: There was a stipulation that he dropped it.

Mr. Toner: The idea is, if the court please, that the block was in a horizontal position and the libelant was over here and here was the beam and the man let go of the block, we will say, and it dropped this way. Normally, it would drop straight but the rope to which it was attached was lying over this beam and it swung as in a pendulum.

The Court: Somebody swung it down on him.

Mr. Toner: That was the force of gravity as it fell this way.

The Court: You stipulated he dropped that block from above there and hit this man.

Mr. Fall: The man testified, 'I was coiling lines just before the accident happened.'

The Court: That is all he was doing and this block was up above him.

Mr. Toner: That is true."

These statements of respondents' proctor are admissible in evidence under the decisions of this court (*Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U. S. 261 (1880)), the power of the court to act upon the facts conceded by counsel being as plain as its power to act upon evidence produced (*Best* v. *Dist. of Columbia*, 291 U. S. 411, 415 (1934).)

Conclusion

We respectfully submit that the decision of the Ninth Circuit Court of Appeals in this case is in conflict not only with the decisions of this Honorable Court but with the decisions of the majority of the circuit courts where these questions have arisen, and that the uniformity of the admiralty law and the certainty of its application is therefore seriously threatened; that the questions presented in this petition are of extreme importance and wide application to seamen; and that the writ of certiorari should be granted in this case in order that the questions presented herein may be clarified and settled by this Honorable Court.

Respectfully submitted,

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